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No. 85-1646

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

RALPH KEMP, Warden,
Georgia Diagnostic and
Classification Center,

Petitioner,

-v-

JOSEPH WILSON, JR.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITIONER'S PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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REASONS WHY THE PETITION FOR CERTIORARI SHOULD NOT BE GRANTED

I.

THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THAT THE ARGUMENT OF THE PROSECUTOR RESULTED IN A FUNDAMENTALLY UNFAIR SENTENCING TRIAL.

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STATEMENT OF THE CASE

(i) Procedural History

The procedural history of this case is amply set out in the Petition for Writ of Certiorari and is adopted by Respondent.

(ii) Statement of Facts

The facts relevant to the single issue presented will be incorporated into the argument on that issue.

REASONS WHY THE PETITION FOR CERTIORARI SHOULD NOT BE GRANTED

I.

THE ELEVENTH CIRCUIT COURT OF APPEALS PROPERLY CONCLUDED THAT THE ARGUMENT OF THE PROSECUTOR RESULTED IN A FUNDAMENTALLY UNFAIR SENTENCING TRIAL.

Petitioner-Warden contends that the Court of Appeals has mistakenly concluded that the long prohibited jury argument, given by the prosecutor in the sentencing phase of this capital trial, did not render that phase of the trial fundamentally un-

fair.

Judge Anderson writing for the panel definitively and emphatically disposed of the Warden's contentions in several ways.

First, he noted that the Georgia Supreme Court itself has condemned the argument since 1977. Wilson v. Kemp, 777 F.2d 621, 623 (11th Cir. 1985). Further, several panels of the Eleventh Circuit, as well as the en banc court, have similarly condemned the argument. See, Potts v. Zant, 734 F.2d 526, 535-36 (11th Cir. 1982, cert. denied sub nom, Kemp v. Potts, ___ U.S. ___, 106 S.Ct. 1386 (1986); Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985)(en banc).

Finally, in discussing the quoted argument, Judge Anderson noted that:

> (a) The "clear import of the [quoted] language is that a sense of mercy should not dissuade one from punishing criminals to the maximum";
>
> (b) That "this position of mercy is dramatically opposed to the Georgia death penalty statute . . .";
>
> (c) The quote "misrepresents" the important legal principles, found in this Court's prior precedents, of consideration of any individual mitigating factors.

Judge Anderson concluded that the argument

> is not a correct representation of the law that controls capital sentencing, and its use by the prosecutor in the capital sentencing phase of Wilson's trial was improper.

Finding the argument improper, the panel next determined that its use was "indeed highly prejudicial" by eliminating mercy from the jury's consideration of penalty. It was "significantly different" from a proper argument because it eliminates mercy - "the most significant factor which might point toward a choice of life imprisonment." Contrary to the contentions of the Warden, Judge Anderson properly considered both Donnelly v. DeChristoforo, 416 U.S. 637 (1974)(Id. at 623) and Caldwell v. Mississippi, ___ U.S. ___, 105 S.Ct. 2633 (1985)(Id. at 627).

Judge Anderson noted that the argument here impinged upon

"core Eighth Amendment concerns," thus undermining confidence in the jury's decision. This "pernicious" practice simply cannot be condoned, and this Court should reject the Warden's request for a grant of certiorari in this case.

CONCLUSION

For the foregoing reasons, this Court should deny Petitioner-Warden's Petition for Writ of Certiorari.

Respectfully submitted,

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